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IN THE

Supreme Court of the United States

October Term, 1957

No. 721

MILO BARRY,

Petitioner,

— *vs.*

PEOPLE OF THE STATE OF CALIFORNIA, SUPREME COURT OF THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

D. WENDELL REID,
16952 Ventura Boulevard,
Encino, California,
Attorney for Petitioner.

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No. .....

MILO BARRY,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA, SUPREME COURT OF THE STATE OF CALIFORNIA,

Respondents.

Petition for Writ of Certiorari to Review the Decision of the District Court of Appeal of the State of California, District 2, Division 1,

The Petition of Milo Barry recites and shows to the Court the following:

Your petitioner was convicted in Department 39 of the Superior Court on July 20, 1956, of the crime of perjury, to wit, Violation of the California Penal Code, Section 118, and sentenced on September 20, 1957, to the State Penitentiary for the term prescribed by law. Motion for new trial was summarily denied. Upon appeal to the District Court of Appeal of the State of California, District 2, Division 1, the said Court on August 14, 1957, affirmed the conviction. After petition duly made for rehearing the said District Court of Appeal modified its

opinion and denied rehearing on September 11, 1957. Upon petition duly made for hearing in the Supreme Court of the State of California, the said Court denied hearing to this petitioner on October 30, 1957.

Citations to Opinions Below.

The original decision and opinion of the District Court of Appeal affirming the conviction in this case is reported at 153 A. C. A. 218. The pertinent parts of this opinion and decision are printed in the Appendix hereto. The order denying rehearing of September 11, and modifying the original opinion and decision of the District Court of Appeal is reported at 154 A. C. A. 739 and printed in the Appendix hereto. The Supreme Court of the State of California denied hearing without opinion on October 30, 1957, and the order is printed in the Appendix hereto.

Statement of Jurisdiction.

The original decision affirming the conviction in this case was filed on August 14, 1957. Petition for rehearing was denied within the time prescribed by the rules, and denial entered by the District Court of Appeal September 11, 1957. Petition was then made to the Supreme Court of the State of California for hearing which was denied by order of that Court October 30, 1957. The decision thus became final in the State Court on said date. The jurisdiction of this Court is envoked to review this case under 28 United States Code, Section 1257 (3). This conviction in the State Court totally ignores and violates petitioner's rights as guaranteed by the Constitution of the United States and is particularly repugnant to his right to "Due Process of Law," to his right against

"Self-incrimination," and his "Immunity from Prosecution" where forced to testify against himself and denies him equal protection of the laws, all of which are guarantees under the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

Statement of the Questions Involved.

1. Is it a denial of Due Process of Law for a trial judge to try the issues in a criminal case when the case is submitted to him sitting without a jury upon the transcript of a preliminary examination together with all of the exhibits, eight in number, and six of the eight exhibits never having been read or considered by the judge as reflected by the documentary record (See affidavit of Deputy Clerk Wilcox, printed in Appendix) of the case and the Court convicts the defendant without having before it all of that evidence which it theoretically must use in rendering its decision on the merits of the case?

2. Is a defendant properly charged with perjury where he has been directed and counseled by the judge to take the witness stand in his own contempt trial at which he was not represented by counsel and was not warned of his constitution right against Self-incrimination? (Calif. Penal Code, Sec. 688, Competency of Witnesses.)

> "Self-incrimination; unnecessary restraint. No person to be a witness against himself in a criminal action, or to be unnecessarily restrained. No person can be compelled, in a criminal action, to be a witness against himself; nor can a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge." (U. S. Const. Amend. V and XIV.)

3. Does the fact that a defendant in a criminal contempt action choose to not appeal the contempt conviction forever preclude him from raising the defense of Self-incrimination in a future prosecution based upon the testimony given under compulsion in the said contempt action?

4. Does the State Court deny equal protection of the laws when the State Courts reverse on appeal convictions in contempt cases where the appeal is directly taken from the contempt convictions and refuses to set aside convictions such as in the instant case where the defendant did not appeal from the contempt conviction but raises the point of Self-incrimination when prosecuted for testimony given in the contempt trial from which under State decisions he would necessarily have been acquitted and when by the Statute of the State he was incompetent to be a witness in his own contempt trial where he had not requested the privilege of testifying and was unrepresented by counsel?

Manner in Which the Federal Question Is Presented.

The federal question regarding Due Process of Law was presented to the District Court of Appeal by showing that upon Stipulation of counsel for the People and Counsel for the defendant the case was submitted to the judge upon the transcript of the preliminary examination consisting of approximately 67 pages and a further stipulation that all of the exhibits be submitted to the judge as a part of the evidence. And the first six of the eight exhibits were a part of the transcript by reference, but the criminal clerk's record of documents showed clearly that the first six exhibits never came to the attention and possession of the judge (See affidavit of Deputy Clerk,

Wilcox printed in Appendix), and he returned to the bench less than thirty minutes after submission of the case stating that he had read the entire transcript and all of the exhibits whereas the record clearly and conclusively showed that the first six of such exhibits had not been read or considered by him and the Court of Appeals disposed of the matter as reflected by (13) of its opinion as the same appears in the Appendix hereto.

The matter of Self-incrimination was raised by the Appellant in the Court of Appeals and the Court of Appeals disposed of this matter in its opinion by stating:

> "However, no objection was made at the contempt hearing although Appellant was represented by counsel. Neither was any objection interposed at the trial of the instant action. If at his trial on the perjury charge appellant had objected to the introduction of his statement made at the contempt hearing on the ground now urged, the prosecution would have been afforded an opportunity to introduce the portion of the contempt hearing transcript which contained the proceedings had preceding those shown in the partial transcript put into evidence in the case at bar, thereby being afforded an opportunity to show, if such was the case, that appellant had requested the opportunity to be heard as a witness in his own behalf at the contempt proceeding, and that the judge presiding thereat called appellant to the stand at the appropriate time following the latter's request."

Accordingly, the District Court of Appeal has placed the burden upon the defendant to make objection and has assumed that there was something in the record which is not reflected to have been there and has totally ignored the defendant's constitutional right against Self-

incrimination. The chain of evidence is totally lacking in any evidence to show the defendant's waiver of his constitutional right against Self-incrimination.

Summary and Statement of the Case.

I.

That on the 7th day of November, 1955, petitioner, Milo Barry, was on trial in Division 22, of the Municipal Court, of the Los Angeles Judicial District, in the City of Los Angeles, before the Honorable Morton L. Barker, Judge presiding, on a charge of contempt of court, wherein he was charged by the Honorable Charles B. McCoy, formerly Judge presiding in the said Division 22, of the said Municipal Court, in two affidavits, each of which charged separately three acts of contempt of court.

The cases were captioned CR. NO. 5293 (Civil No. 13283), and CR. NO. 5293 (Civil No. 1005601). The defendant was acquitted by Judge Barker on the latter case, but was convicted on all three charges in the first of the two cases. The charges upon which he was convicted were: (1) Forgery of a document, to wit, an assignment of a contract; (2) Offering of that forged document in evidence in a Civil trial; (3) Perjury committed by this defendant in testifying falsely about the alleged forged document. The defendant was convicted, sentenced to serve time and pay a fine, and he paid both penalties.

II.

At the trial of this contempt, the defendant, petitioner herein, was *not* represented by counsel, but appeared in *Propria Persona*. He was called to the witness stand by the Judge to bear testimony in his own criminal contempt

trial. He was not warned, or in any way apprized of his constitutional right not to testify, or that if he did testify, such testimony might be used against him, and it was the first time he had ever been involved in a criminal or quasi-criminal proceeding. He repeated this same testimony, which he had given in the Civil Case 13283, and which was the subject of the No. 3 charge of contempt in that proceeding; that is to say, he denied the alleged fact that he had altered or forged the document in question, to wit, the assignment of the contract. [Ex. 4.] Received in evidence by reference. [Rep. Tr. p. 61, lines 4-9, incl.]

III.

Subsequently, early in March of 1956, a Complaint was filed, No. 130899, charging petitioner in Count I, "with offering false evidence in violation of Section 132 of the Penal Code of California"; Count II, "Perjury in violation of Section 118 Penal Code of the State of California, on or about the 21st day of September, 1955." (This is based upon testimony in the Civil Action No. 13283); Count III, "Perjury in violation of Section 118 Penal Code, State of California, on or about the 7th day of November, 1955." (This is based upon testimony given in the contempt trial.) And *the* count upon which in the instant case the defendant was convicted and is the subject of this appeal. [Clk. Tr. p. 3.]

IV.

A preliminary hearing was held in Division 15, of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, on March 28, 1956, and on April 9, 1956, the defendant was arraigned in the Superior Court of the State of California, in and for the County of Los Angeles, in Department 41 thereof. Motion was made to dismiss the In-

formation and set for hearing April 24, 1956, continued to May 1, 1956, and on the latter date the motion was denied and the defendant entered his plea of "not guilty" on all three counts. The case was then assigned to Department 39 of the said Superior Court for trial on June 20, 1956, at 9:00 a. m. Case was called for trial on June 20, and upon the defendant's motion, by and through his attorney, P. Erbsen, then representing him, he entered two additional pleas, "Former Jeopardy" and "Prior Conviction" as to Counts I and II. Trial and argument of the two additional pleas were continued to July 20, 1956, at 9:15 a. m., in Department 39. The cause was called for trial on that date in that department at 9:30 a. m. [Rep. Tr. p. 3] and both the defendant, Petitioner herein, and the People waived Jury Trial. The case was submitted to the Judge, Honorable H. Burton Noble, presiding, on the transcript of the preliminary hearing, together with all of the eight exhibits which had been introduced at the preliminary hearing. The first six of these exhibits were introduced and included in the record by reference and received here by reference. Exhibits 7 and 8 were physically transferred from the Municipal Court to the Superior Court and were actually in court at the time of the submission. The other six exhibits were not before the court at the time of the submission or at any time before judgment (See index to Cert. record, "Certificate of Clerk," p. 1, and Clerk's affidavit Appendix "B" to this petition) and the Judge did not have any opportunity to see and read and consider the said six exhibits. The case was submitted at 9:30 a. m. on the said date. The court then proceeded to handle other matters and retired from the bench to chambers. [See Rep. Tr. p. 4, line 17.] The Judge returned to the bench at 10:00 a. m. same day and stated that he had read the

entire transcript of the preliminary hearing and *all* of the exhibits. The court found the defendant not guilty on Counts I and II, but vacated the order and found the defendant had been in former jeopardy as to Counts I and II and the Judge adjudged the defendant, the petitioner herein, guilty on Count III. [See Rep. Tr. pp. 68-70, incl.]

V.

The defendant was permitted to file a written application for probation and the matter was continued to September 13, 1956, for probation and sentence hearing as to Count III. On September 13, 1956, the matter was called and the probation report had appended thereto a voluminous statement which had been prepared by Judge Charles B. McCoy, of the Municipal Court, the same judge who had cited this defendant for contempt. Defendant's attorney, P. Erbsen, requested a week's continuance for the purpose of studying this surprising document; and the court granted the continuance, but refused the continuation of $1,000.00 bail for the defendant and remanded him to custody of the County Sheriff in Default of $10,000.00 bail. [Rep. Tr. pp. 71-74.]

VI.

Petitioner then discharged his attorney, P. Erbsen, and substituted in his place his present attorney, D. Wendell Reid. On September 20, 1957, when the case was again called, D. Wendell Reid, representing petitioner, moved the court to grant a new trial, which motion was summarily denied, and the said attorney then filed with the court a notice of appeal, and after discussion with the Judge, the bail on appeal was set at $2,500.00. Appeal was perfected to the District Court of Appeals, Second Appellate District and assigned to Division I thereof, captioned "People of the State of California, Plaintiff, and

Respondent, vs. Milo Barry, Defendant and Appellant, 2nd Criminal 5811." Several points on appeal were raised, among them, three federal questions. First, it was contended that petitioner had been denied, both under the State Constitution and the Constitution of the United States "Due process of law." (See appellants Op. Br. p. 8; Fifth Amendment, Constitution of the United States.) Second, it was contended that the defendant had been denied his right to be free from self-incrimination as guaranteed by the Constitution of the State of California and of the United States of America. (See App. Op. Br. p. 9; Fifth Amendment, Constitution of the United States.) Third, that he has formerly been in jeopardy for the same offense. (See App. Op. Br. p. 21, first paragraph; Fifth Amendment, Constitution of the United States.) Notwithstanding these contentions as reflected by the record in this case, the said District Court of Appeal affirmed the conviction of this petitioner, denying these constitutional rights, and filing its decision on August 14, 1957.

VII.

Your petitioner asked for a rehearing in the said District Court of Appeal, of the State of California, and filed petition therefor on August 29, 1957. The said District Court of Appeal had erroneously stated in its opinion that petitioner was represented by counsel at the contempt trial, when the record disclosed that he was appearing in *propria personna*. On September 11, 1957, the said District Court of Appeal denied rehearing, but struck certain language from its former opinion, thus deleting therefrom the statement that he was represented by counsel. Petitioner then filed a petition for hearing in the Supreme Court of the State of California and was on October 30, 1957, denied hearing in that court.

VIII.

The guarantee in the Fifth Amendment to the Constitution of the United States against self-incrimination was not raised by this defendant in the contempt trial in the Municipal Court on November 7, 1955, for the reason that this defendant was not advised of his constitutional right against self-incrimination and the defendant did not appeal that conviction for contempt. He was convicted in that proceeding and paid a fine and also served five days in jail. At no time during that proceeding was the defendant represented by counsel nor did he have advice of counsel. If he had appealed that conviction, the court of Appeal, Second District of California, would probably have reversed that conviction if it followed its own decisions in such cases, for seven days before filing its decision for confirming this conviction, the same District Court of Appeal reversed the cases of three men who had been held in contempt in the Domestic Relations Department. (See *Charles Killpatrick, Ralph J. Davis, and Humberto Saavedra v. Superior Court, State of California, et al., Respondents*, 153 A. C. A. 155.)

The instant case arises upon a charge of perjury allegedly committed in that contempt trial, where this defendant was ordered by the Judge to take the witness stand and testify. Exhibit 7 in this case which is a partial transcript from the contempt trial discloses the following:

"The Court: All right. Will you take the stand, then, Mr. Barry.

MILO BARRY,

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:"

It should be noted that this language is an order of the court, not a question to the witness as is conclusively reflected by the punctuation of it and the tenor of the language as transcribed by the Reporter. It must be noted that this defendant was then and there on trial for contempt and was not represented by counsel. He certainly would not bring himself in further contempt of court by refusing to take the stand when so ordered by the Judge then presiding.

IX.

It was also upon the testimony there given after that order that he is now convicted and sentenced to the State Penitentiary for the term prescribed by law in the State of California. This conviction seems to *compound* the violation by the State court of the defendant's constitutional guarantee against self-incrimination because it prosecuted him and convicted him in a second trial upon testimony which he had been forced in the former trial to give in his own defense. *The fact that this defendant did not see fit to appeal from the conviction of contempt of court in no way precludes any waiver of his right to object to the self-incrimination when he is again prosecuted upon the testimony which had been forced from him in the first proceeding.*

X.

The Second District Court of Appeal in California whose decision of August 14, 1957, which was modified on September 11, 1957, and which became final by the refusal of the Supreme Court of the State of California to review it in its order of October 30, 1957, presumes the proceedings in the Superior Court to have been,

regular and therefore refuses to consider that the statements of the Judge in that proceeding where he states:

> "The Court: Let the record show that the court has read the entire transcript of the preliminary hearing in this matter and all of the exhibits." [Rep. Tr. p. 68, lines 6-8, incl.]

is a statement which the record shows to be an impossible fact for the reason that the item in the certified record from the District Court of Appeal entitled "Certificate of the Clerk" together with the affidavit of that clerk attached hereto as Appendix "B" discloses that the Judge did not have exhibits one to six before him because those exhibits so far as this record discloses and it seems to be clear on that point were never in possession of the Superior Court. If they were not in possession of the Superior Court, then the trial Judge did not read and consider them as he stated and this is not irregularity necessarily in the proceeding, but reversable error committed by the trial court in attempting to pass upon evidence not before it.

It should also be noted that the Superior Court in this conviction violated Due Process of Law, in that the Judge in Department 39 prejudged this case by his own admission. For this we refer this Honorable Court to the following language of the Judge in trial court:

> "The Court: Mr. Erbsen, I think the record ought to show that I discussed this matter with you in chambers and I indicated to you that I didn't think this man was a good probationary risk and I was going to send him to state prison. I told you that in view of this report that was filed, which I had taken into consideration in reaching this conclusion, that

I thought in fairness to you I ought to give you an opportunity to answer that report if you cared to. Under those circumstances the defendant now knowing what very likely the outcome is going to be, I only have two choices: One, either to remand him or to set the bail considerably higher than it is. . . ."

"The Court: . . . $1,000.00. I will increase the bail to $10,000.00 if you want to put up bail; otherwise I am going to remand him." [Rep. Tr. p. 73, lines 3-15, 20-22.]

The foregoing citations to the record and quotes therefrom show beyond any doubt that the trial court acted arbitrarily and capriciously and without regard to any constitutional guarantees either to freedom from "Self-incrimination" or "Due Process of Law," as guaranteed United States Constitution, Amendment V.

XI.

This defendant certainly is entitled to be protected in his constitutional guarantee against self-incrimination at any time that he desires to raise that point. When he did not raise the point in the contempt proceeding and chose to serve the sentence there imposed, he did not thereby waive his right to raise the point when subsequently he was prosecuted for testimony which he had given in that former case under compulsion by the Judge. He did raise this issue in this proceeding as well as the issue of Due Process of Law and Double Jeopardy.

Argument.

With regard to the matter of this prosecution based upon testimony given by this petitioner when he was on trial in a criminal proceeding for contempt of court, the record as set forth in this petition shows the facts and quotes from the record of the testimony in that trial. This indicates clearly that this petitioner was compelled by the Judge to testify and therefore to be prosecuted for any offense based upon that testimony is a violation of the Fifth Amendment to the Constitution of the United States guaranteeing all persons freedom from Self-incrimination.

There is no waiver of this right in this case because the testimony obviously was not voluntarily given but on the other hand was given by this petitioner upon a command from the Judge and it is most unreasonable to expect any citizen untrained in the law and even one who had some training therein to disobey the command of the Judge when he was even then on trial for *Contempt of Court.*

C. J. S., Volume 22, Section 46, page 113, says:

> "C. *Waiver of Immunity* . . . the mere fact that he testifies without objection, or without claiming his right to immunity or privilege, is insufficient to constitute a waiver, if the element of compulsion is present."

N. Y.—*People v. Buffalo Gravel Corporation*, 195 N. Y. S. 940;

U. S.—*United States v. Moore*, D. C. Ore., 15 F. 2d 593;

Iowa—*Doyle v. Wilcockson*, 169 N. W. 241, 184 Iowa 757.

In the contempt case from which the prosecution in the instant case resulted this petitioner was ordered by the Judge who cited him for contempt to appear and show cause why he should not be held in contempt. He, therefore, was compelled to attend and when the Judge ordered him to take the witness stand and he was unrepresented by counsel, he was compelled to testify. This seems adequately clear in this case, and, therefore, he is immuned from prosecution based upon this testimony or the Constitutional Guarantee against Self-incrimination is in fact annullity. It was said by the court in *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 332, 333, 1 Am. S. R. 851:

> ". . . . A person who yields from the necessity of obedience cannot be said to have the power of acting by his own choice; and where the law says he shall be compelled to attend, and shall be compelled to testify, acquiescence is not election. . . . Under such circumstances, the witness must be deemed to speak for the safety of his person, and in view of the indemnity which the law promises."

The conviction in this case is particularly repugnant to the American concept of justice under the Constitutional Guarantee against Self-incrimination because this defendant was charged in the contempt proceeding which was heard on November 7, 1955, in the Los Angeles Municipal Court, Division 22, with having committed perjury when he testified about that certain document in the Civil Trial September 21, 1955; and his testimony at the contempt trial when he was ordered to the stand by the Judge was merely a repetition of the exact testimony formerly given in the Civil Case and in the Contempt Trial amounted only to a denial of the charges

there made against him which he had a right to do under his plea of "not guilty" to the specifications of contempt. Accordingly, if a conviction upon this charge is permitted to stand, it is as much double jeopardy as any other situation which can be conceived as double jeopardy. For if a defendant in any criminal proceeding is to be prosecuted for perjury when in that proceeding he is ordered to testify and merely denies the ultimate fact which is the gravamen of the charge against him then no man can come into the court and deny on a plea of "not guilty" the ultimate fact to be proved without laying himself liable to a prosecution for perjury and to permit such a conviction as this to stand in the law of this land would be a mockery to the American concept of the guarantees in the "Bill of Rights" as set forth in the first Ten Amendments to the Constitution of the United States.

Attached as Appendix the following:

Appendix "A"—Pertinent parts of the decision of August 14, 1957, District Court of Appeal, District 2 Division 1, and denial of rehearing and modification on September 11, 1957, of August 14, 1957, decision by District Court of Appeal, Second District, Division 1.

Appendix "B"—Affidavit of Deputy Clerk Wilcox.

Appendix "C"—Pertinent parts of Constitution of United States Amendment V and Amendment XIV.

WHEREFORE the petitioner herein prays this Honorable Court to issue a Writ of Certiorari and to review his conviction which is in direct violation of three of his rights under the Fifth Amendment to the Constitution of the United States, namely, his right to be free from Self-incrimination, his right to Due Process of Law, and

his right to be free from twice being placed in jeopardy for the same offense; and the petitioner herein prays this Honorable Court for its further order admitting him to bail pending the final action of this Court upon the petition for Writ of Certiorari unless he shall have been previously released from custody by some other court either of the State of California or of the United States.

Respectfully submitted,

MILO BARRY,

By his Attorney,

D. WENDELL REID.

APPENDIX "A."

[Crim. No. 5811. Second Dist., Div. One. Aug. 14, 1957.]

The People, Respondent, v. Milo Barry, Appellant.

Prosecution for perjury. Judgment of conviction affirmed.

D. Wendell Reid for Appellant.

Edmund G. Brown, Attorney General, and Herschel T. Elkins, Deputy Attorney General, for Respondent.

WHITE, *P. J.*—In an information filed by the district attorney of Los Angeles County, defendant was charged in Count I with the offense of offering false evidence (Pen. Code, §132), and in Counts II and III with the crime of perjury (Pen. Code, §118). Upon his arraignment, defendant made a motion to set aside the information under the provisions of section 995 of the Penal Code. Upon the denial of this motion, he pleaded not guilty as to all counts and later entered additional pleas of former jeopardy as to Counts I and II. Trial by jury was duly waived, at which time it was stipulated between the parties, "that this case may be submitted to the court upon the testimony taken at the preliminary hearing with the same force and effect as though the witnesses were called, sworn and testified under oath at this trial; that all stipulations entered into at the preliminary be entered into at this trial; that the exhibits received in evidence at the preliminary hearing be received in evidence at this trial as they were received at the preliminary; that where it states 'By reference,' that they be received by reference in this case; that the defendant waives the right to further cross-examination to be confronted by any witnesses that have testified against him; that both sides reserve the right to produce additional evi-

dence." In response to an inquiry by the court as to whether there would be any additional evidence, all counsel answered in the negative. The court then announced, "I will hear the matter today." Following a recess court reconvened and the trial judge announced, "Let the record show that the court has read the entire transcript of the preliminary hearing in this matter and all of the exhibits." Argument was waived, and the court announced its decision finding defendant not guilty as to Counts I and II and guilty of perjury as charged in Count III. Upon inquiry by the district attorney as to whether the court found defendant not guilty on Counts I and II, "or did you find in favor of the defendant as to his pleas of jeopardy prior to conviction?", the court vacated its decision, and stated, "I will find that the defendant has been in jeopardy as to Counts 1 and 2." Motion for a new trial as to Count III was denied, as was an application for probation, and defendant was sentenced to state prison. From the judgment of conviction defendant prosecutes this appeal.

Appellant's next assignment of error is that the submission of the case on the record of the preliminary examination was contrary to law and a denial of due process is unavailing. Appellant insists that such procedure permits the court to have before it the inadmissible as well as the legally admissible evidence and contends that, "In the instant case, almost the entire record of the Preliminary Hearing is comprised of inadmissible evidence. (See Reporter's Transcript, entire copy of preliminary examination.)" His claims with regard to the manner in which this cause was submitted to the trial judge and the constitutionality and legality thereof were decided adversely to him in the cases of People v. Wallin, 34 Cal. 2d 777, 780-782 [215 P. 2d 1]; People v. Cohen, 94 Cal. App. 2d

451, 456, 457 [210 P. 2d 911]; People v. Brown, 145 Cal. App. 2d 778, 780 [303 P. 2d 68]; People v. Graves, 84 Cal. App. 2d 531, 535 [191 P. 2d 32]; People v. Young, 100 Cal. App. 2d 488, 489, 490 [224 P. 2d 46]).

Appellant's claim that under the procedure agreed to in the case at bar he was denied the right to offer evidence in his own behalf is refuted by the record herein which shows that the stipulation to submit the cause on the transcript of the preliminary hearing contains the provision that he reserved the right "to produce additional evidence" and again, when the court inquired, "Will there be additional testimony," appellant's counsel in his presence, answered, "No testimony, Your Honor." Thus, opportunity was afforded appellant to produce evidence in his behalf but he declined so to do.

Appellant earnestly urges that the trial judge did not have the entire record before him and could not possibly have read and considered it together with the eight exhibits, including two municipal court files, within the time elapsing from submission of the cause on the preliminary transcript to the time of rendition of the decision. It is true, as pointed out by appellant, that the preliminary examination transcript contained some 60 pages of testimony and that the exhibits included several documents introduced in the municipal court civil trial and at the contempt hearing. It is also true, as appellant states, that the record herein shows that court convened on July 20, 1956, at 9:30 a.m. and called appellant's case for trial. That the foregoing stipulation as to submission of the cause was entered into; that, according to the reporter's transcript, "Whereupon, other matters were handled by the court on the court's calendar which did not relate to this particular (appellant's) case." That thereupon a recess was taken and that

court reconvened at 10 a.m. when appellant's case was again called and the court announced, "Let the record show that the court has read the entire transcript of the preliminary hearing in this matter and all of the exhibits." What appellant actually contends, as set forth in his closing brief, is that, "It is not contended that any particular amount of time, more or less would amount to error merely because of the length of such time; the point made by appellant is that all reasonable and reasonably intelligent men *must* recognize the fact that no normal individual, whether he be judge or otherwise, could possibly read and consider the record in this case and the complicated exhibits therein within the space of thirty minutes, or less as the record shows, and particularly that he *could not* have read or even seen the six exhibits which were never in his possession."

As to appellant's contention that it was impossible for a trial judge to read the 60-page transcript and the exhibits in less than thirty minutes, we could dismiss it by reliance upon the disputable presumption "That official duty has been regularly performed" (Code Civ. Proc., §1963, subd. 15) because there is not one word in the record before us to contradict that presumption. On the contrary, the record shows that the trial judge did read the entire preliminary examination transcript and all the exhibits, and at no time was the truth of the trial judge's statement in that regard controverted. To us it seems manifestly unfair to a trial judge for an accused and his counsel to sit silently by at the time a decision is rendered and on motion for a new trial, without mentioning a charge as serious as the one here presented, and then, for the first time on appeal, when the trial judge cannot be heard, to accuse him of finding a defendant guilty of a felony and sentencing

him to the penitentiary without reading the testimony upon which such conviction and sentence is predicated.

In justice to the trial judge, we cannot refrain from saying that a complete refutation of appellant's attempted stricture is reflected in the complete familiarity with the issues presented by the information and framed by the evidence which the trial judge exhibited. He differentiated between the three counts in the indictment, acquitted appellant on Counts I and II, and gave his reasons, based on the evidentiary features of the case, as to why he was convinced beyond a reasonable doubt, of appellant's guilt under Count III. There is nothing in the record to substantiate appellant's contention, and with all due respect to the time element, in light of the foregoing, it presents no ground for ignoring the presumption above referred to.

Finally, appellant asserts that he was compelled to testify against himself at the contempt hearing on November 7, 1955, and upon which Count III of the information herein was founded. That this was in violation of his constitutional rights and that because he did not request to be a witness, appellant was not competent to testify to such (Pen. Code, §§1323, 688; Cal. Const., art. I, §13). Appellant asserts that because of such incompetency, ". . . his testimony, however false it may have been, could not be the subject of this prosecution for Perjury, for it is *ab initio* null and void and not material to the case." Appellant's contention that unless an accused requests the privilege of testifying, he is incompetent as a witness, and that the prosecution has no legal right to ask him to testify is well established (People v. Talle, 111 Cal. App. 2d 650, 664 [245 P. 2d 633]). In support of his claim in this regard, appellant relies upon a partial transcript of testimony adduced at the contempt proceedings before Judge Barker

on November 7, 1955 (People's Exhibit No. 7 at the perjury trial). The partial transcript reveals that at the contempt hearing the court stated: "All right. Will you take the stand then, Mr. Barry," whereupon appellant was sworn as a witness, testified and was cross-examined by Deputy City Attorney Frank Rothman. However, no objection was made at the contempt hearing although appellant was represented by counsel. Neither was any objection interposed at the trial of the instant action. If at his trial on the perjury charge appellant had objected to the introduction of his statement made at the contempt hearing on the ground now urged, the prosecution would have been afforded an opportunity to introduce the portion of the contempt hearing transcript which contained the proceedings had preceding those shown in the partial transcript put into evidence in the case at bar, thereby being afforded an opportunity to show, if such was the case, that appellant had requested the opportunity to be heard as a witness in his own behalf at the contempt proceeding, and that the judge presiding thereat called appellant to the stand at the appropriate time following the latter's request. Again, in this case, we are confronted with a situation wherein the record on appeal does not indicate whether appellant's testimony in his own behalf was given upon suggestion by the court or at appellant's request. We are faced with the further fact that at the trial no objection was interposed to appellant's testimony given at the contempt hearing, on the ground that he was incompetent to testify as a witness for the reasons now urged for the first time on appeal. ". . . the rule is settled by decisions of this court, found in nearly every volume of our reports, that on appeal all intendments are in favor of the regularity of the action of the court below, and that error will never be presumed, but must affirmatively appear" (People v.

Douglass, 100 Cal. 1, 4 [34 P. 490]). Such being the rule on appeal, there must be an *affirmative* showing of error to overcome the presumption to the contrary. In the absence of such a showing, we must presume that the contempt trial was regularly conducted in all respects (People v. Chessman, 35 Cal. 2d 455, 462 [218 P. 2d 769, 19 A. L. R. 2d 1084]; People v. Coahran, 104 Cal. App. 2d Supp. 861, 863 [231 P. 2d 592]). This is especially true when, as here, no objection was interposed at the trial of appellant in the court below.

The judgment is affirmed.

DORAN *J.*, and FOURT, *J.*, concurred.

APPENDIX "A-1."

(District Court of Appeal of the State of California, Second Appellate District. Division One; Crim. No. 5811, filed September 11, 1957.)

The People of the State of California, Plaintiff and Respondent vs. Milo Barry, Defendant and Appellant.

THE COURT:

The opinion heretofore rendered in this cause (153 A. C. A. 218) is hereby modified by striking therefrom the words "although appellant was represented by counsel." appearing on the last line of page 236 and the first line of page 237 and inserting a period after the word "hearing" appearing in the last line of page 236.

As so modified, the Petition for rehearing is denied.

APPENDIX "B."

Affidavit of Deputy Clerk, R. Wilcox.

State of California, County of Los Angeles—ss.

Comes now R. Wilcox, Deputy Clerk, Superior Court, Los Angeles County, and upon his oath deposes and states:

That he is the Deputy Clerk who prepared and signed the receipt for documents. A certified copy is included in the certified record of Superior Court Case 180056, Cr. App. 5811, as next to the last item of the record.

That where an exhibit was introduced into evidence by reference, the notation to that effect is made thereon. That where a line is drawn through the Exhibit number on the document, this line means that the *particular Exhibit was not received* by the Superior Court Clerk, Criminal Division, and in the instant case the markings made by affiant indicate the Exhibits 1 to 6 introduced by reference were not physically transferred to the office of the Clerk of the Superior Court.

S/ R. WILCOX
R. Wilcox, Deputy Clerk

Subscribed and sworn to before me this 5th day of December, 1957.

HAROLD J. OSTLY, County Clerk
By S/ E. G. HATCHER, Deputy
Notary Public, in and for the County of Los Angeles, State of California.

APPENDIX "C."

Constitution of the United States.

Amendment V

"No person shall be held . . .; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without Due Process of Law; . . ."

Constitution of the United States.

Amendment XIV

Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."